Public Prosecutor v Mohd Noor bin Ismail

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P–05–60 OF 1999

GOPAL SRI RAM, RICHARD MALANJUM AND HASHIM YUSOFF JJCA

10 JULY 2006

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1) — Trafficking in dangerous drugs — Evidence of chemist — Chemist failed to give weight of samples taken to establish nature of the drug — Whether prima facie case of trafficking established — Whether charge ought to be amended to one of possession

The accused was charged with and tried on a charge of drug trafficking under s 39B(1) of the Dangerous Drugs Act 1952 ('the DDA'). At the close of the case for the prosecution, the High Court found that a case of trafficking had not been made out due to the unsatisfactory nature of the chemist's evidence. The High Court judge thus amended the charge to one of possession under s 6 of the DDA. The accused pleaded guilty to that charge. He was convicted and sentenced to a term of five years' imprisonment from the date of conviction. The prosecution appealed to the Court of Appeal.

Held, dismissing the appeal:

(1) It was clear from the evidence that the chemist did not give the weight of the samples he had taken to establish the nature of the drug. There was thus a serious doubt about the weight of the cannabis which had been recovered from the accused (see para 2).

(2) The present case was indistinguishable from the case of *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 (SC). The trial judge had really no option but to follow it (see para 5).

[Bahasa Malaysia summary

Tertuduh dituduh dengan dan dibicarakan atas satu pertuduhan mengedar dadah di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('ADB'). Di penutup kes pihak pendakwa raya, Mahkamah Tinggi mendapati bahawa satu kes pengedaran tidak dibuktikan berdasarkan keterangan ahli kimia yang tidak memuaskan hati. Hakim Mahkamah Tinggi oleh itu telah meminda pertuduhan itu kepada pertuduhan pemilikan di bawah s 6 ADB. Tertuduh telah mengaku bersalah terhadap pertuduhan tersebut. Beliau telah disabitkan dan dijatuhkan hukuman lima tahun penjara daripada tarikh sabitan. Pihak pendakwa raya telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Adalah jelas daripada keterangan bahawa ahli kimia itu tidak memberikan berat sampel-sampel yang beliau telah ambil untuk membuktikan sifat dadah tersebut. Oleh itu terdapat keraguan serius berhubung berat kanabis yang diterima daripada tertuduh (lihat perenggan 2).

(2) Kes ini tidak dapat dibezakan dengan kes *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 (MA). Hakim perbicaraan sememangnya tiada pilihan tetapi untuk mengikutnya (lihat perenggan 5).]

Notes

For cases on s 39B(1) of Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 281–289.

Cases referred to

Leong Bon Huat v Public Prosecutor [1993] 3 MLJ 11 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 39B(1)

Appeal from: Criminal Trial No 45–8– of 1998 (High Court, Pulau Pinang)

Ahmad Fairuz bin Zainal Abidin (DPP, Attorney Generals Chambers) for the prosecution.

Gopal Sri Ram JCA (delivering jdugment of the court):

[1] The accused (and that is how we will refer to the respondent in this appeal) was charged with trafficking 15,000g of cannabis contrary to s 39B(1) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the prosecution's case, the trial judge held that a case of trafficking had not been made out. He amended the charge to one of possession under s 6 of the Act. The accused pleaded guilty to that charge. He was convicted and sentenced to a term of five years imprisonment from the date of conviction. The prosecution appealed to us and we dismissed the appeal. Our reasons now follow.

[2] The sole ground on which the court found no prima facie case of trafficking was the unsatisfactory nature of the chemist's evidence. It is clear from the evidence that the chemist did not give the weight of the samples he had taken to establish the nature of the drug. In short, there is a serious doubt about the weight of the cannabis which had been recovered from the accused.

[3] In arriving at his decision the learned judge referred to and applied the judgment of the Supreme Court in *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11. In that case, the chemist had said this:

I did not obtain the weight of each sample taken but the total weight of samples taken for analysis was more than 10% of the net weight of 793.85g.

[4] In relation to this evidence, Edgar Joseph SCJ who delivered the judgment of the Supreme Court said:

> Now, what does 'more than 10% of the net weight of 793.85g' mean? Does it mean 11% or 12% or 13% or more than that? Not to put too fine a point on it, the expression 'more than 10%' is ambiguous and there should be no ambiguity on such a matter where the life of a subject is at stake. What is necessary is that the testimony of the chemist upon such a matter must be clear and convincing.
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> To take the point a little further, if by the expression 'more than 10% of the net weight of 793.85g' means a little more than 10% — and we think, in ordinary parlance, it would not be incorrect to say that it bears such a meaning — then, as a matter of simple arithmetic, the testimony of the chemist, at best, established that the appellant was in possession of a little more than 79.30g of cannabis, which would be well below the statutory minimum of 200g of cannabis required for the operation of the presumption of trafficking under s 37(da) of the Act.
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> It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity, have involved the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate, having regard to the total weight of the plant material, for the reasons stated.

[5] Before us, the learned deputy sought to argue that there was nothing inherently incredible about the chemist's evidence. That argument misses the point. When pressed to show in what manner the trial judge had misdirected himself, he frankly conceded that he could not take his case beyond the grounds set out in the petition of appeal. Those grounds which attack the judge's criticism of the chemist's evidence are really without any merit. At the risk of repetition, we would say that the present case is indistinguishable from *Leong Bon Huat* and the judge had really no option but to follow it. The appeal being devoid of merit, was dismissed. Conviction and sentence were affirmed.

Appeal dismissed.

Reported by John Paul Simon